

ELECTRONICALLY FILED - 2019 February 20 4:01 PM - SCPSC - Docket # 2018-364-WS - Page 1 of 2

1 DAUFUSKIE ISLAND UTILITY COMPANY, INC.

2 DOCKET NO. 2018-364-W/S

3 Surrebuttal Testimony of Michael J. Guastella

4 Before the South Carolina

5 Public Service Commission

6 Testimony Prepared: February 20, 2019

7 Hearing Date: February 28, 2019

8
9 Q. Please state your name, business address, employer and title.

10 A. Michael J. Guastella, 725 North Highway A1A, Suite B103, Jupiter, Florida 33477.

11 I am employed by Guastella Associates, Inc. ("GA") and my job title is Vice
12 President of Operations.

13 Q. Have you reviewed the photographs included within DIUC's Answer, Exhibit
14 JFG-5, and Exhibit JFG-6?

15 Yes. The photographs fairly and accurately depict certain areas along Driftwood
16 Cottage Lane, including 29, 33, 36, 42, and 46 Driftwood Cottage Lane. One of
17 the photographs in the Answer is an overhead photograph and map overlay of the
18 same area showing address numbers for the properties and generally showing the
19 lot lines for the depicted parcels. The image is captioned "Driftwood Lane
20 Destroyed." Exhibit JFG-6 also includes a screenshot photograph depicting the
21 current and proposed base lines and setback lines. I recognize the area depicted in
22 all the photographs. The images in the photographs are consistent with my personal
23 knowledge of the area. I am familiar with the area depicted in the photographs, as

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- 1 they are located on Daufuskie Island, South Carolina where DIUC operates.
2 Additionally, DIUC has been closely monitoring this area for several years, as
3 discussed in the various witnesses' testimony.
4 **Q.** **Does this conclude your testimony at this time?**
5 **A.** **Yes.**

BEFORE THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
COLUMBIA, SOUTH CAROLINA

HEARING #19-11763 MARCH 20, 2019 10:02 A.M.

Docket No. 2018-364-E

Stephen and Beverly Noller -and-
Michael and Nancy Halwig,
Complainants/Petitioners

v.

Daufuskie Island Utility Company, Inc.
Defendant/Respondent

TRANSCRIPT OF
ORAL ARGUMENT

VOLUME 1 OF 1

COMMISSION MEMBERS PRESENT: Comer H. 'Randy' RANDALL,
Chairman; Justin T. WILLIAMS, VICE CHAIRMAN; and
COMMISSIONERS John E. 'Butch' HOWARD, Thomas J. 'Tom'
ERVIN, Swain E. WHITFIELD, and G. O'Neal HAMILTON

ADVISOR TO COMMISSION: David W. Stark, III, Esq.
Legal Advisory Staff

STAFF: Jocelyn Boyd, Chief Clerk/Executive Director; Joseph
Melchers, General Counsel; Jerisha Dukes, Esq., Legal Advisory
Staff; Randy Erskine, Information Technology Staff; Melissa
Purvis, Livestream Technician; and Jo Elizabeth M. Wheat, CVR-
CH/M-GNSC, Court Reporter

APPEARANCES:

NEWMAN JACKSON SMITH, ESQUIRE, representing
STEPHEN and BEVERLY NOLLER -and- MICHAEL and NANCY HALWIG,
COMPLAINANTS/PETITIONERS

THOMAS P. GRESSETTE, JR., ESQUIRE, representing
DAUFUSKIE ISLAND UTILITY COMPANY, RESPONDENT/DEFENDANT

PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

101 EXECUTIVE CENTER DRIVE
COLUMBIA, SC 29210

POST OFFICE BOX 11649
COLUMBIA, SC 29211

www.psc.sc.gov

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P R O C E E D I N G S

CHAIRMAN RANDALL: Please be seated,
everybody. Welcome, everyone, to this hearing this
morning. I want to ask Mr. Stark, first, to read
the docket.

MR. STARK: Mr. Chairman and other Commissioners, we are here for a proceeding in Docket No. 2018-364-WS, to hear oral arguments in the case of Stephen and Beverly Noller versus — I'm sorry — and Michael and Nancy Halwig, Complainants, versus Daufuskie Island Utility Company, Incorporated, Respondent.

Mr. Chairman, this proceeding has been scheduled for 10 o'clock a.m. in the Commission offices at 101 Executive Center Drive, Columbia, South Carolina 29210, and it's to happen on March 20th.

Mr. Chairman, the docket is in order.

CHAIRMAN RANDALL: Thank you, Mr. Stark.

We'll take appearances from the parties now.

MR. SMITH: Thank you, Mr. Chairman.

CHAIRMAN RANDALL: Let's get you on a microphone, too, and make sure -- punch that microphone, and you can go either -- you can have the one right in front of you.

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1 MR. SMITH: Let's make sure this one is
2 working? Very good.

3 CHAIRMAN RANDALL: Sounds good.

4 MR. SMITH: My name is Jack Smith, on behalf
5 of Complainants. I'm with the Nelson Mullins firm.

6 CHAIRMAN RANDALL: Welcome, Mr. Smith.

7 MR. GRESSETTE: Good morning Commissioners.
8 My name is Tom Gressette, and I'm here on behalf of
9 Daufuskie Island Utility Company, Incorporated, and
10 my firm is Walker, Gressette, Freeman & Linton,
11 down in Charleston.

12 CHAIRMAN RANDALL: Welcome, Mr. Gressette.

13 MR. GRESSETTE: Thank you, sir.

14 CHAIRMAN RANDALL: Before we get going, I want
15 to just make sure - I think Commissioner Belser has
16 spoken with you, but Commissioner Belser has
17 recused herself because she was involved in this
18 during her stint at ORS. So, that's why we have an
19 empty chair.

20 Okay. I think we start these proceedings with
21 Mr. Smith.

22 MR. SMITH: Thank you, Mr. Chairman and
23 Commissioners. Thank you for the opportunity to
24 speak with you this morning to respond to any
25 questions you may have.

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1 This proceeding is about the jurisdiction of
2 the Commission. It's been fully briefed. We
3 believe we have shown that the Commission certainly
4 has jurisdiction in this matter over the Daufuskie
5 Island Utility Company. It is a public utility,
6 under the definition in the statutes and the
7 regulations. You have jurisdiction over its
8 behavior, its contracts, its provision of service
9 to its customers. And what we have here are
10 existing customers on Daufuskie Island who had a
11 portion of the mains owned by the utility company
12 that were damaged and no longer usable along part
13 of the street that the homes of the Complainants
14 have on Daufuskie Island in Melrose Plantation.

15 The jurisdiction of the Commission stems from
16 both its ability to approve or disapprove contracts
17 of the utility and for the provision of service.
18 The authority it has – the authority of the
19 Commission is very broad in the statute. It has
20 promulgated regulations; they are very clear. And
21 we believe that the fact that the utility company
22 knew of a danger, a threat, to its system, failed
23 to take any action regarding it, has basically
24 forced these customers to either give up their
25 homes or to pay for the utility company's

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1 reconnection of its mains in order to provide them
 2 water and sewer service is clearly within your
 3 jurisdiction.

4 It's important to note the, kind of, factual
 5 sequence here. In October of 2016, when Hurricane
 6 Matthew caused the damage, immediately, the Halwigs
 7 did approach ORS. And in their response, on
 8 December 2, 2016, the ORS was clear: "Here are the
 9 responsibilities of the utility company. They're
 10 supposed to provide service, maintain service,
 11 but," the ORS said, "we can't find a regulation
 12 that requires a timeframe for that." Well, in
 13 order to use their homes, with the utility company
 14 saying, "We're not going to do anything," they
 15 engaged an engineer, hired a contractor. They paid
 16 money into an escrow account to pay the contractor,
 17 so the money was paid upfront, and they proceeded
 18 to have the work begun. In the meantime, the
 19 utility company had done nothing. Had not provided
 20 an easement document form, had no assistance in
 21 providing that. Provided no contractor or other
 22 written guidance on what would be required, except
 23 that, "You have to do everything. When you finish
 24 installing it, if it's done correctly, we'll accept
 25 that and we'll begin giving you service again."

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1 Unfortunately, the Melrose Resort golf course,
2 which is the path across which the Complainants
3 were able to get permission to put the utility, was
4 in the process of going bankrupt at the end of
5 2017. So when work began in November of 2017,
6 expected to be finished before the holidays that
7 year, the resort said, "Stop. We don't have any
8 paperwork in place." And so, unfortunately, that
9 delayed the completion until all that was sorted
10 out after the transfer of the property in
11 bankruptcy in March of the next year and then the
12 completion by September. Even when it was
13 completed, the utility company said, "Well, but you
14 also have to pay this tax, and you have to pay our
15 attorneys' fees," and, of course, whether that's in
16 the contract or not, you never had a chance to
17 determine that. The contract was provided to the
18 ORS in January, the end of January, in 2018, well
19 after the work had started, money was paid into
20 escrow, but service had been withheld and no action
21 to put even temporary service into these homes
22 since the October 2016 storm.

23 So your jurisdiction to review and decide
24 whether the question of the cost of that capital
25 replacement infrastructure is a cost to the

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1 utility, or of these customers, is clearly related
 2 also to rates. You know, can the utility decide
 3 that, "We're going to make them pay for it, so we
 4 never have to ask you," whether they should be
 5 paying for it; "Can we include it in our rate
 6 structure, or not?" Is the contract and the
 7 premium they've extracted from these customers
 8 something that should or should not be included in
 9 what this Commission reviews in terms of this
 10 utility?

11 It's important to note it's also a for-profit
 12 utility. It gets a guaranteed rate of return
 13 through the rate structure that you provide it when
 14 they present you with that and you approve it.
 15 They may disagree with you. However, you have that
 16 authority. You can find that they have failed to
 17 follow your regulations, and you can fine them.
 18 You could determine that the contract should not
 19 have been in place, they didn't have the authority
 20 to do that, that that was infringing on your
 21 ability to set rates, and that they should not get
 22 the benefit, they should have to pay for it,
 23 whether that comes in the form of a direct payment
 24 of not paying future utility bills until it's
 25 repaid, but those are options clearly in front of

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1 this Commission.

2 The Commission has full legal authority to
3 regulate utilities over the broad spectrum of their
4 activities. If the jurisdiction of the Commission
5 is preempted by the unilateral action of a utility,
6 it has the effect of basically taking these
7 people's homes from use. Then, you know, why would
8 the Commission not have that type of jurisdiction?
9 Certainly, the whole idea of a public service
10 commission and regulating utilities is so that
11 service is provided at a reasonable cost to all
12 customers.

13 I'm sure that you will hear countervailing
14 arguments, you know, from the utility, of course.
15 That's our job, to represent our clients'
16 interests. But we believe here that it's clearly
17 in the Commission's interest and the public
18 interest for this contract not to be approved after
19 the fact, that it was not presented to the
20 Commission until after the utility was — the
21 installation was begun.

22 Now, when the Commission's — ORS Staff said,
23 "We cannot tell you when they have to put it in,
24 but here's what they have to do," the Halwigs and
25 the Nollers were faced with a choice. They were

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1 over a barrel. They needed to get their homes back
2 in service. The Halwigs, in fact, rent that
3 property as part of their way to help pay for it,
4 so that when they are ready to retire it would be
5 less of a financial burden for them. Dr. Noller,
6 unfortunately, has Alzheimer's, and he and his wife
7 enjoy being at that location. It's one of the
8 spots they like to go to for his comfort.
9 Unfortunately, for two years, neither family had
10 access to their homes more than temporary stays,
11 because there's no water or sewer service.

12 And so that type of behavior of the utility
13 company not to provide temporary service or to
14 assist in any way in trying to provide replacement
15 mains for their equipment is really something this
16 Commission needs to look into. We believe that
17 it's — the Commission has full authority under
18 58-5-210, -140, and other provisions, and certainly
19 under your regulations, the 103-541 and -743 are
20 very clear that information needs to be provided to
21 the ORS and approved by the Commission.

22 The fact is, time was of the essence. If the
23 Commission^[sic] wasn't going to assist in any way in
24 trying to replace its mains, then they had to take
25 that action and do it quickly. So before a

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1 contract was ever presented or terms were ever
2 given to them, the Halwigs and the Nollers engaged
3 an engineer, put the money in escrow, hired the
4 contractor, and work began. And that was in
5 November of 2017.

6 So we believe that the after-the-fact actions
7 of the utility can't really wrest jurisdiction from
8 this Commission. The fact that someone has
9 neglected a clear danger that they recognize –
10 their prefiled testimony clearly shows they were
11 well aware of this area and monitored it for years.
12 But when the utility line in the street at
13 Driftwood Cottage Lane was damaged, no plans have
14 been made with the resort owner or the golf course
15 to get access across the course to replace that.

16 The pipes in front of these customers' homes
17 are still there; it's the same pipe that was there
18 before the damage in 2016. The only difference was
19 it was no longer connected at the other end of
20 Driftwood Cottage to go back to Martinangel Lane.
21 And so they had to get a new connection. They were
22 able to get the easement from the golf course
23 owner – the new owner after the bankruptcy was
24 resolved – and then complete the installation.

25 COMMISSIONER ERVIN: Counsel, excuse me for

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1 interrupting you, but would you mind if I ask a
2 question?

3 MR. SMITH: Please. That's what we're here
4 for.

5 COMMISSIONER ERVIN: Just in looking at the
6 pleadings in the case, isn't it true that your
7 clients are asking this Commission to award a money
8 judgment for breach of contract and damages, in a
9 sum of, what, \$100,000? Is that what they're
10 seeking?

11 MR. SMITH: They believe that they should not
12 be responsible for the money they paid to install;
13 they don't believe they should be responsible for
14 the tax or attorneys' fees. And we're not asking
15 for a money judgment like we were in court. We
16 understand that the Commission has broad authority
17 to determine what type of remedy may be available.

18 COMMISSIONER ERVIN: Let me call your
19 attention to South Carolina Code Section 58-5-290,
20 and you may not have a copy so I'm going to give
21 you both copies, if you'd like, to see it. But my
22 reading of this statute says that — and I'll wait
23 till you get a copy.

24 MR. GRESSETTE: [Indicating.] Thank you, sir.

25 MR. SMITH: [Indicating.] Thank you.

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1 COMMISSIONER ERVIN: My reading of the statute
2 says that the Commission shall, subject to review
3 by the courts as herein provided, determine just
4 and reasonable charges, classifications, rules, and
5 regulations, or practices to be thereafter observed
6 and enforced, and it shall fix them by order herein
7 provided.

8 That clearly means that we can't go back in
9 time and undo an alleged wrong. It means,
10 thereafter, we might have some potential to look at
11 the matter in the future as it relates to rates or
12 charges or practices. But doesn't this close the
13 door on your claims?

14 MR. SMITH: No, sir, not at all. You have
15 regulations in place that require the approval of
16 the Commission before a contract is entered into.
17 That's a violation of your rules. And you can
18 enforce a violation of your rules. We're not —
19 we're saying the contract should not have been
20 required. And the fact that it wrests from this
21 Commission the ability to determine whether the
22 utility should've had — this is part of its rate
23 structure. When the utility bought or the new
24 owners bought this utility, obviously the utility
25 had been there for decades and it was in somewhat

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1 shape that needed some capital improvements and
2 repairs. And those types of things were in it, but
3 in spite of the known danger, there was nothing in
4 that application for rates and in that purchase,
5 here, to replace or make arrangements for potential
6 damage they knew could occur. That --

7 COMMISSIONER ERVIN: Back to your claims,
8 though, you are seeking monetary damages, and it
9 relates to contract, well, issues. Wouldn't that
10 properly be a matter for the court? I believe your
11 clients also have alleged that they were coerced
12 into entering into this contract. That clearly is
13 a defense -- I mean, an allegation that would
14 perhaps be best resolved by a jury.

15 MR. SMITH: Certainly, these are legal
16 claims -- a contract claim could be brought in
17 court. But it's not the place for the Commission
18 to regulate its utilities if, in fact, the utility
19 has said, "You do this and we'll provide you
20 service," but then they don't --

21 COMMISSIONER ERVIN: But they have provided
22 service, so that's a moot point now, right?

23 MR. SMITH: It's not a moot point, sir.

24 COMMISSIONER ERVIN: Why?

25 MR. SMITH: Because as soon as we do not pay

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1 that federal tax that's alleged to be due, which
2 this Commission also has before it, or the
3 attorneys' fees, they'll turn it off again.

4 COMMISSIONER ERVIN: Well, they're not allowed
5 to turn it off again, because they – by raising, in
6 their pleadings, the fact that – I mean, they've
7 raised as a defense, and you've also alleged that
8 there's this threat of disconnection, and they've
9 raised in their defense – they've asserted that
10 that's a moot issue since service is being
11 provided. So doesn't that defense, in and of
12 itself, effectuate a waiver of any right to
13 disconnect by the company?

14 MR. SMITH: Not unless this Commission were to
15 so order. I'm certain that, should we not pay,
16 they will disconnect.

17 COMMISSIONER ERVIN: Well, if they disconnect,
18 then you could come back and address it at that
19 time. It would be ripe for determination.

20 MR. SMITH: It's ripe for determination now,
21 sir.

22 COMMISSIONER ERVIN: You're getting service
23 now.

24 MR. SMITH: We are getting service now, but we
25 also have had to pay for that service, which is

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1 only on because the parties all agreed that it
2 would not affect anything in this case going
3 forward. To use it now as a moot point and try to
4 close the door with it would be prejudicing us for
5 agreeing that it would have no prejudicial effect.

6 COMMISSIONER ERVIN: Let's hear from opposing
7 counsel, and then we may come back to you, if you
8 don't mind.

9 COMMISSIONER WHITFIELD: Mr. Chairman, I would
10 like to ask Mr. Smith a question before we —

11 CHAIRMAN RANDALL: Certainly.

12 COMMISSIONER WHITFIELD: I don't know if —
13 sir, I don't know if you're done or not, but could
14 I ask you, Mr. Smith, just for the record — I think
15 I know this, but I want to be clear on it — your
16 client has no ongoing interruption in service or no
17 ongoing wrongful charges, if you will, or anything
18 violating current Commission rules or regs that
19 you're aware of right now?

20 MR. SMITH: I don't know if some of the
21 charges that were actually given to them for
22 service, when they had none, have been resolved or
23 not. There may be pending charges that have not
24 been resolved. We were told they would be, but I
25 frankly don't know that. In terms of the charge

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1 for the installation of the utility, you know, that
2 is still there.

3 COMMISSIONER WHITFIELD: But at the current
4 time, as far as you know, your client is being
5 charged properly and being served, as such, is -- I
6 guess is my question.

7 MR. SMITH: Except for the threat of
8 disconnect under terms that were not agreed to, and
9 being forced into the agreement. The question is
10 whether -- do they have the authority to require
11 that of existing customers. That's before this
12 Commission.

13 COMMISSIONER WHITFIELD: Right.

14 Well, I don't have anything further, Mr.
15 Chairman.

16 If you have more -- I know you were still kind
17 of going. If you have more you want to say, or
18 maybe some other Commissioners might want to --

19 CHAIRMAN RANDALL: Commissioner Howard has
20 some questions.

21 COMMISSIONER WHITFIELD: Thank you, Mr.
22 Chairman.

23 COMMISSIONER HOWARD: That was my statement.
24 Mr. Chairman, if you will let him finish his
25 presentation before we ask questions, I think it'd

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1 be better off, and also the other counsel for
 2 Daufuskie, too. I just think we ought to finish
 3 the presentation before we start asking questions.
 4 CHAIRMAN RANDALL: All right. Continue.
 5 MR. SMITH: A little late for that, but thank
 6 you, sir.
 7 I believe that the relief that this Commission
 8 can give is varied. You could require that service
 9 not be cut off. You could require that service be
 10 for free until the cost of the installation was
 11 basically repaid. I believe you could fine them,
 12 but that would certainly not be something that we
 13 are seeking. But we think that it is incumbent
 14 upon the Commission to regulate utilities in this
 15 State in how they treat their existing customers.
 16 This is not a developer. This is not "Let's go
 17 into a new area." The pipes that were there before
 18 the storm took out part of the road are still
 19 there; that was what was connected back across the
 20 golf course in order to provide service. The fact
 21 that these customers had to do that or lose the use
 22 of their homes indefinitely, if not forever, is a
 23 clear dereliction of the requirement that this
 24 Commission has put on them to maintain service.
 25 The ORS is very clear in its response as to

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1 what the maintenance and provision of service
2 required. They just couldn't find a timeframe
3 within which to force the utility to do that. This
4 Commission has the authority to force the utility
5 to do that. I think you have broad latitude not to
6 treat it as a contract damages' claim, but whether
7 or not did the utility obey the rules. Did it
8 present a contract of this magnitude, concerning
9 the ability and willingness to provide service, to
10 the Commission for its approval and get that
11 approval before it implemented it. Or is it going
12 outside of the rate schedule, going outside of your
13 authority, and trying to regulate itself by making
14 those decisions without your input or approval, and
15 without the exercise of your authority?

16 I'll be glad to stop at this point and answer
17 questions, or proceed to closing. Thank you.

18 CHAIRMAN RANDALL: Any other questions for Mr.
19 Smith?

20 COMMISSIONER ERVIN: Mr. Chairman, I have one
21 follow-up question, please.

22 CHAIRMAN RANDALL: Commissioner Ervin.

23 COMMISSIONER ERVIN: Thank you, sir.

24 Counsel, if the contract in question was never
25 approved by the Commission, you can allege in

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